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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 UNITED STATES OF AMERICA,) No. CR 07-00603 JW
13 Plaintiff,)
14 v.) UNITED STATES' OPPOSITION TO
15) DEFENDANT'S MOTION TO RESET
16 KENNETH VAN AALSBURG,) SENTENCING DATE
17 Defendant.)
18

19 On April 28, 2008, the defendant pled guilty to possessing child pornography. At
20 the request of defense counsel Thomas Nolan, the Court: (1) allowed the defendant to
21 remain out of custody pending sentencing; and (2) set the defendant's sentencing four
22 months out to the current date of September 8, 2008. The defendant now files a motion
23 requesting that his sentencing be delayed until October 13, 2008 at the earliest. The
24 defendant's moving papers also contain troubling indications that the defense will seek
25 further delays of sentencing past the proposed October 13, 2008 date. The defendant's
26 moving papers note that defense counsel "cannot anticipate what may or may not interfere
27 with the sentencing or Mr. Van Aalsburg on the October 13, 2008 date requested." Nolan

1 Declaration at ¶11. Furthermore, defendant's motion requests an evidentiary hearing
2 related to various defense objections to his presentence report, yet professes "a lack of
3 understanding" as to the appropriate procedures for such a hearing and does not propose
4 that the procedures be clarified before the Court prior to October 13th – thereby raising
5 the prospect of additional delays. Nolan Declaration at ¶9.

6 For the reasons stated below, the government opposes the defendant's motion to
7 continue his sentencing. To the extent that the Court is considering granting the
8 defendant's request to continue, this government respectfully requests that this matter
9 should be heard on the Court's calendar on September 8, 2008 (or sooner if practicable).¹
10 The government respectfully requests that at such an appearance, the parties and Court
11 would discuss: (1) the defendant's motion to continue sentencing; (2) what procedures
12 would govern a potential evidentiary hearing at sentencing.

12 BACKGROUND

13 On April 28, 2008, the defendant entered an open plea of guilty to possessing child
14 pornography and also admitted to a related criminal forfeiture count. See Govt. Ex. 1-
15 Transcript of 4/28/08 Change of Plea Hearing. At the defendant's change of plea hearing,
16 the government moved for the defendant's immediate remand on the grounds that there
17 were not extraordinary reasons why the defendant's remand into custody would be
18 inappropriate under the Bail Reform Act. Govt. Ex. 1 at 1-5, 11-12, 19-23. The
19 government highlighted three factors specific to this case which supported defendant Van
20 Aalsburg's immediate remand: (1) the disturbing nature of the child pornography the
21 defendant possessed (which including depictions of the rape of infant children as well as
22 sadistic and masochistic images of known victim children being forced to wear a dog
23 collar); (2) recent suicides by child pornography defendants in this district; and (3) the
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26 ¹ Contrary to the requirements of the local rules, the defense's motion to continue
sentencing did not calendar a date on which it was to be heard before the Court.
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1 defendant's disturbing (and ultimately unsuccessful) request to the magistrate court at the
2 setting of his conditions of release that he be allowed to have unsupervised contacts with
3 a fourteen year old female client at the defendant's pilates studio. This Court denied the
4 government's motion to remand. Govt. Ex. 1 at 1-5, 11-12, 19-28.

5 During the April 28, 2008 change of plea hearing, defense counsel Nolan
6 requested that the sentencing in this matter be set for September 2008—nearly four months
7 after the defendant's change of plea. Govt. Ex. 1 at 17. This Court agreed to Mr. Nolan's
8 request, and set this matter for sentencing on September 8, 2008 over the government's
9 objections. Govt. Ex. 1 at 17, 28. The probation office has subsequently prepared a final
10 presentence report in this matter in which it has recommended that the defendant receive
11 a sentence of 120 months imprisonment.

12 The defendant now requests additional delays in his sentencing. On August 25,
13 2008, the defendant filed a motion to continue his sentencing. Notwithstanding the fact
14 that the sentencing date in this matter was set nearly four months ago, defense counsel
15 states that he is now unavailable until at least October 13, 2008 due to a trial in Monterey
16 County, California. Nolan Declaration at ¶1-3. The defense motion also indicates that an
17 evidentiary hearing is necessary, and attaches as an exhibit a defense letter to the
18 probation officer presenting dozens of challenges to the presentence report. See Nolan
19 Declaration Ex. A. In that letter, the defendant now disputes virtually every aspect of his
20 offense conduct. The defendant takes this position notwithstanding the fact that he
21 represented to this Court under oath at his change of plea that he possessed child
22 pornography and that there was a factual basis for several of the sentencing enhancements
23 he now contests. See Govt Ex. 1 at 13, 15-17. As a result of the defendant's abrupt shift
24 in position, the probation office's final presentence report has concluded that the
25 defendant is not entitled to receive any credit for acceptance of responsibility under the
26 sentencing guidelines.

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DISCUSSION

1 As long as the defendant remains out of custody, the government objects to the
2 defendant's request to continue the sentencing in this matter.² The government still
3 believes that the defendant, having pled guilty to possessing child pornography, should
4 have been remanded into custody under the mandatory remand provisions since there are
5 no "extraordinary reasons" why his remand would be inappropriate. The defendant
6 possessed thousands of appalling images of child pornography (including depictions of
7 infant rape), and the record indicates that he distributed child pornography as well. The
8 defendant unsuccessfully petitioned the magistrate court to have unsupervised contacts
9 with a 14-year old child, which raises concerns that he may pose a danger to the
10 community. Defendant has now had longer than the typical period of time before
11 sentencing to put his affairs into order. To the extent that there ever were "extraordinary
12 reasons" why the defendant should not be remanded, a newfound scheduling conflict on
13 the part of one of the attorneys at the law firm of Nolan, Armstrong, and Barton is not one
14 of them. This matter should be resolved expeditiously, and if the defense requests that
15 sentencing be delayed for reasons that are irrelevant under the Bail Reform Act then the
16 defendant should remanded into custody in the meantime.

17 Furthermore, the September 8th sentencing date was set at the defense's request
18 over four months ago. The fact that defense counsel Nolan may have created a
19 scheduling conflict after this Court set a sentencing date in this matter at his request does
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23 ² Undersigned government counsel communicated to defense counsel Nolan that the
24 government would consider his request for a continuance of the sentencing if the defense would:
25 (1) provide the specific length of the proposed continuance; (2) stipulate that there would be no
26 further continuances; and (3) confer with the government regarding potential procedures for the
evidentiary hearing the defense was requesting. The government received no response from the
defense as to these points until it received its Motion to Continue at the close of business
yesterday.

1 not justify a continuance of Van Aalsburg's sentencing. The defendant presents no
2 reason why any of the other six lawyers listed on the website of the Nolan, Armstrong,
3 and Barton firm could not represent him at sentencing. In fact, Mr. Michael Armstrong
4 has already represented the defendant at his initial appearance before the Magistrate Court
5 (when defendant sought to have unsupervised contacts with a minor) and Mr. Daniel
6 Barton was present in the Courtroom both for the defendant's 4/28/08 change of plea and
7 also represented the defendant at prior status conferences in the case.

7 CONCLUSION

8 For the reasons stated below, the government opposes the defendant's motion to
9 continue his sentencing. If the Court is inclined to grant the defendant's motion, the
10 government respectfully requests that this matter should be set on the Court's calendar on
11 September 8, 2008 (or sooner if practicable). At that appearance, the government
12 respectfully requests that counsel for the government and an attorney from Nolan,
13 Armstrong, and Barton be ordered to be prepared to discuss: (1) the defendant's motion to
14 continue sentencing; and (2) what procedures would govern a potential evidentiary
15 hearing at sentencing.

16 Dated: August 26, 2008

17 Respectfully submitted,

18 JOSEPH P. RUSSONIELLO
United States Attorney

19 _____
20 /s/
21 JOSEPH FAZIOLI
Assistant United States Attorney